



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**Civil Appeal 45 of 2005**

**AKAMBA BUS SERVICES LTD.....PLAINTIFF**

**~VRS~**

**EMILY CAROLINE BARASA.....1<sup>ST</sup> DEFENDANT**

**STEPHEN KIMANI MUIRURI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This is an appeal against the judgment of Busia Resident Magistrate in SRM CC No.380 of 2001. The Appellant Akamba Bus Services Limited was the Defendant in the lower court while the 1<sup>st</sup> Respondent was the Plaintiff and the 2<sup>nd</sup> Respondent the 3<sup>rd</sup> party. The court apportioned liability between the Appellant and the 2<sup>nd</sup> Respondent at 60:40 ratio.

The counsel for the Appellant Mr. Ashioya holding brief for Archer & Wilcock took the court through the grounds of appeal no.1, 2, 7 and 8. It was assumed the other grounds were abandoned by the counsel although he did not expressly state so. It was argued that the lower court found the Appellant liable and apportioned liability without any evidence to support his finding. The police abstract was only marked in court and never produced in evidence. Negligence against the Appellant was not proved because the Plaintiff was moving very fast. The accident involved two vehicles and two donkeys. No sketch plan was produced to show how the accident occurred. The Investigating Officer was a critical witness but did not testify.

Mr. Omondi for the 1<sup>st</sup> Respondent opposed the appeal on grounds that the Plaintiff proved her case to the standards required by law. She produced a bus fare receipt to show she was a passenger in 1<sup>st</sup> Respondent's motor vehicle reg. no.KAH 029 N. The evidence of the 1<sup>st</sup> Respondent on negligence was confirmed by DW1 who investigated the accident. The Plaintiff was an eye witness and no other witness was required to corroborate her evidence. Mr. Omondi took issue with the date of judgment in the appeal record given as 25<sup>th</sup> November 2005 while the correct date is 17<sup>th</sup> November 2008. He argued that the memorandum of appeal refers to a non-existent judgment.

The evidence adduced in the lower court by the Plaintiff on liability was only her own testimony. She testified in part:

*“At Limuru Fly-Over we had an accident along Nairobi – Nakuru Road. The accident involved two motor vehicles. The other motor vehicle was KAL 476 N Nissan. We were going down the slope very fast the accident happened on the left side of the road.”*

The Plaintiff was a passenger in the Akamba Scania Bus belonging to the Appellant. The words “we were going down the slope very fast” do not describe who was driving the vehicle and how it was being driven. The Plaintiff did not call the Investigating Officer to corroborate her evidence on who was to blame for the accident. It is not a requirement that the Plaintiff's evidence be corroborated, but it must be capable of showing that the driver of the vehicle in question was driving in a negligent manner. In her plaint dated 14<sup>th</sup> September 2001, she sets out six particulars of negligence. It is surprising that in her

evidence, she did not even attempt to prove any of those particulars. The record is very clear that the police abstract was not produced in evidence. It was only marked as MFI 3. In the absence of a police abstract, the Plaintiff cannot prove that any accident occurred involving the Appellant's or 2<sup>nd</sup> Respondent's vehicle. The bus ticket will only prove that the Plaintiff was a passenger in the Appellant's bus. It was argued by Mr. Omondi that DW1 corroborated the Plaintiff's evidence on liability. I reject this argument. The Plaintiff must adduce her own evidence to prove her own case. She cannot rely on the Defendant's evidence. I have perused the evidence of DW1. He was a private investigator hired by the Insurance Company of the Appellant to investigate the accident. He found that the Nissan Matatu Registration No.KAL 476 N was to blame. This vehicle belonged to the 3<sup>rd</sup> party. The Plaintiff sued the Defendant who is the owner the Scania Bus registration No. KAH 029 N. The Plaintiff states categorically in her evidence that "*the Nissan Matatu was not to blame.*" The evidence of the Plaintiff and DW1 is therefore at variance.

On the issue of the date of the judgment, this error is not fatal to the appeal. All other documents in the appeal record give the correct date of the judgment. All other documents in the appeal record give the correct date of the judgment as 17<sup>th</sup> November 2008. The judgment itself is contained in the record and bears the correct date. It is only the heading of the memorandum of appeal which quotes the wrong date of 25<sup>th</sup> November 2005. The whole appeal record leaves no doubt in the mind of the court that the Appellant is appealing against the judgment delivered on 17<sup>th</sup> November 2008 in Busia SRM CC No.380 of 2001.

The magistrate found the Appellant more liable than the 3<sup>rd</sup> party to bear 60% liability. It is clear from DW1's evidence that the Nissan Matatu Reg. No.KAL 476 N came to the way of the Appellant's vehicle registration number KAH 029 N. The Nissan matatu's driver saw two donkeys on his lane but was unable to stop and let them pass. He instead swerved to the side of the bus. The lower court did not explain the reason for blaming the Appellant's bus which remained on its lane. Neither did he give reasons why he apportioned more blame on the driver of the bus. It is imperative that every finding of a court be backed by reasons. It was wrong for the magistrate not to give reasons for his finding.

I find that the magistrate erred in law and fact in finding the Appellant to blame when there was no evidence to prove negligence or any of the particulars thereof.

For the foregoing reasons, this appeal is allowed. The finding on liability is quashed and the awards of general and special damages set aside. Each party to meet their own costs of this appeal.

**F. N. MUCHEMI**

**JUDGE**

***Dated, Delivered and Signed at Busia***

***This 3<sup>rd</sup> day of November, 2009 in the presence of Mr. Omondi for respondent.***